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Nos. 94-1614, 94-1631, 94-1985 (Consolidated)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

UNITED STATES DEPT. OF COMMERCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER STATE OF OKLAHOMA'S REPLY BRIEF ON THE MERITS

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Oklahoma's opening brief argued that the Secretary of Commerce's decision not to statistically adjust the 1990 decennial census was the only legally permissible course of

action available. Oklahoma advanced this argument under art. I, § 2, cl. 3 of the Constitution which mandates that the "actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct." Under Oklahoma's view, Congress exercised the power granted to it by the Constitution and enacted the Census Act, which directs the manner in which a census is taken. Congress allows statistical sampling for some census purposes but has specifically prohibited a statistical adjustment of the decennial census for apportionment purposes under 13 U.S.C. § 195. The same straightforward argument was similarly advanced by Wisconsin in its opening brief.[1]

Oklahoma further argued that Congress' decision not to permit statistical sampling to determine the census count for apportionment purposes commands considerable deference from the judiciary and furthers important national goals of political stability and public confidence. Oklahoma addressed the lack of justiciable standards for reviewing census methodology. Oklahoma also contended that the Second Circuit Court of Appeals' decision is inconsistent with decisions of the Sixth and Seventh Circuits which hold the apportionment clause does not create a constitutional right to census accuracy.

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[1]The federal petitioners, however, agreed with the Court of Appeals "that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." [U.S. Br. 26.] The federal petitioners made no reference to § 195 in their brief. The Executive Branch and the States have different views as to whether adjustment was a permissible choice under the law. Both Oklahoma and Wisconsin have contended throughout that the Secretary's decision not to adjust was constitutionally permissible and statutorily required.

The *City of New York, et al.* respondents ["respondents"] choose to rebut few of these contentions, except indirectly, or in a fashion that avoids the merits of the particular argument.

1. With respect to Oklahoma's central argument that the Secretary's decision was consistent with the manner that Congress had by law directed, the respondents first contend that the prohibition of 13 U.S.C. § 195 is not an issue properly before the Court (thereby aligning themselves with the argument used earlier by the federal petitioners in seeking to defeat oral argument by the States[2]). According to the respondents,

> [t]he question of whether section 195 prohibits the use of statistical sampling in determining the census figures for apportioning Representatives is separate and distinct from the question of whether the decision of the Secretary not to correct for the differential undercount of minorities was consistent with the language of the Constitution.

[Respondents' Br. 73.] Whatever distinction the respondents are seeking to draw from this observation, it has no bearing here. Instead, it is clear that the issue, as framed and argued by both Oklahoma and Wisconsin, is before the Court.

The "Questions Presented" by Oklahoma include:

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[2]The Court granted the motion to divide argument to the extent of allowing one State, Wisconsin, to divide argument with the Solicitor General.

> Whether the decision of the Secretary of Commerce is consistent with the mandate of Article I, § 2, cl. 3 of the United States Constitution that "[t]he actual Enumeration shall be made . . . in such Manner as [Congress] shall by Law direct."

[Oklahoma's Petition for Writ of Certiorari, at i.]

Wisconsin presented the question of whether the Secretary's decision is "consistent with the language of the Constitution and the constitutional goal of equal representation." [Wisconsin's Petition for Writ of Certiorari, at i.][3]

As framed, the questions presented by both States fairly include the § 195 issue. [Sup.Ct.R. 14.1(a).] Certainly, at the very least, whether the plain language of § 195 prohibits statistical adjustment and whether that congressional directive is constitutional are issues "essential to analysis" of the decision below, which fall within the "fairly comprised" rule. *Procunier v. Navarette*, 434 U.S. 555, 559-60 n. 6 (1978); R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993), § 6.25(f), at 339.

Supreme Court Rule 14.1(a) serves both to provide the respondents with notice and assist the Court in selecting

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[3]Ironically, the broadest, most generic Question Presented is by the federal petitioners, who voiced the attack now used by the respondents. The federal petitioners' Question Presented reads: "Whether the decision of the Secretary of Commerce not to undertake a statistical adjustment to the 1990 census violated the Constitution." [Federal Petitioners' Petition for Writ of Certiorari, at i.]

cases. *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). Respondents cannot contend lack of notice. The identical argument was addressed vigorously by the States in briefing below. In their joint brief to the Court of Appeals, Oklahoma and Wisconsin argued:

> Article I, § 2, cl. 3 of the United States Constitution provides that the decennial census shall be conducted in such manner as Congress by law directs. Even if Congress could constitutionally direct the census to be statistically estimated, at this time it has not done so.

Oklahoma and Wisconsin expressly relied upon the prohibition of 13 U.S.C. § 195. [Supp. Br. of Wis. and Okla. at 1-9, see Dkt. Entry 11/8/93, Jt. App. 30.] The plaintiff-appellants below [respondents here] replied to this argument and claimed that Wisconsin and Oklahoma were "wrong" in their interpretation of 13 U.S.C. § 195. [Reply Br. of Plt.-Applts. at 24, fn. 9, see Dkt. Entry 12/6/93, Jt. App. 31.] The Court of Appeals decided against Oklahoma and Wisconsin by interpreting § 195 in a fashion which allowed and even "encouraged" the use of statistical sampling in determining census figures. [Pet. App. 25.][4]

Oklahoma's and Wisconsin's petitions for writ of certiorari, in compliance with Supreme Court Rule 14.1(f), set forth 13 U.S.C. § 195 as one of the three constitutional and statutory provisions involved. [Oklahoma's Petition for Writ of Certiorari, at 4-5; Wisconsin's Petition for Writ of

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[4]Consistent with the respondents, references given as "Pet. App." are to Wisconsin's appendix to the petition for a writ of certiorari filed in No. 94-1614.

Certiorari, at 1.][5] Respondents do not attempt to, and cannot, explain how § 195 can be designated as "involved in the case" and not be an issue which is encompassed by the petitions and properly before the Court.

Against these facts of record, the respondents and federal petitioners are simply incorrect when they assert that Oklahoma's Question Presented (under art. I, § 2, cl. 3) fails to encompass the proper interpretation of Congress' directive in 13 U.S.C. § 195. Respondents are equally wrong when they make this same assertion against Wisconsin.

2. To bolster their contention that argument should not be allowed on this issue, respondents also claim this question will only serve to multiply the issues before the Court, because (quoting the federal petitioners), the Court will "be required to determine whether such a prohibition [is] itself consistent with the Constitution." [Respondents' Br. 73.] Oklahoma contends this paramount issue simplifies rather than multiplies the issues. Unless § 195 means something different from its plain language or unless it is not consonant with the constitutional text, the inquiry should end with § 195. The inquiry should end because the manner of conducting the census is delegated to Congress and Congress responded with § 195.

The reality is that, absent the intervention of Oklahoma and Wisconsin in the lower court actions, this potentially dispositive issue would have been left unaddressed because the remaining parties before this Court share the common goal of simply ignoring 13 U.S.C. § 195. The Executive Branch has a strong interest in gaining for a

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[5]The federal petitioners included no reference to 13 U.S.C. § 195.

federal agency the broadest decision-making power possible and thus for altogether different reasons than the respondents "agrees with the court of appeals that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." [U.S. Br. 26.]

The debate between the Executive Branch federal petitioners and the respondents presumes the Secretary possesses the statutory power to adjust and focuses primarily on whether the Secretary's administrative decision not to do so is constitutionally flawed. Oklahoma contends the Secretary is statutorily prohibited from any course other than the one taken. If fundamental change is going to occur in the manner of determining the census count, then the change must occur through Congress and not through any other branch of government. Respondents and the federal petitioners cannot selectively ignore constitutional and statutory text that impacts reasoned analysis. In *any* review of an agency's action, it is proper to ask whether the agency has authority to do what it did or what it is being asked to do. It is impossible for this Court to rule that the Secretary should have adjusted the 1990 census for apportionment purposes *without* determining whether he has the power to adjust. Yet, that is precisely what respondents ask this Court to do.

3. The respondents choose not to address the portion of the Constitution which directly speaks to the business of census taking. Article I, § 2, cl. 3 states that the decennial census shall be conducted "in such Manner as [Congress] shall by Law direct." Respondents make no reference to this provision or to its application. If the Constitution directs that Congress determine census methodology and § 195 is a response to that constitutional directive, then it would appear

that § 195 should be addressed in a case that concerns census adjustment.

In their seventy-five page brief, respondents devote a single page to countering the merits of the States' interpretation of § 195. Respondents' argument is limited to a recitation of 13 U.S.C. § 141(a), and the conclusion that the Secretary can choose to rely on § 141(a), instead of § 195, as the basis for his authority. The respondents close by stating that the Court of Appeals correctly held that these two provisions indicate that Congress encourages adjustment and other courts and the federal petitioners concur. There is no further discussion of the § 195 issue.

Respondents' argument is wrong. While Oklahoma concedes that a handful of lower courts have judicially interpreted § 195 in a way that circumvents the plain language, none, save the Court of Appeals, have concluded that the two sections read together meant Congress intended to encourage use of statistical sampling for apportionment purposes. In this case, the Second Circuit reached this strained conclusion, but the other three cases did not do so. Moreover, Oklahoma submits that none of the three 1980 district court holdings relied upon by respondents can withstand careful analysis.[6] There is nothing in the Census

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[6]The cases are: *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 642 F.2d 617 (6th Cir. 1981). [See Respondents' Br. 74.] *Carey* held that adjustment was permissible under § 195, but only if done in conjunction with traditional counting methods. *City of Philadelphia* held that § 195 permits, but does not require, sampling for apportionment purposes. *Young* held that § 195

Act that allows the Secretary to choose to follow one part of the Act and ignore another part of it. The Census Act

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allows adjustment but prohibits the use of figures solely derived by statistical methods. None of the three cases holds that § 195 *encourages* adjustment for apportionment purposes.

Carey is wrong because it relies on *Young* and because it concludes that it must ignore the clear language of § 195. *Carey*, 508 F. Supp. at 415. *Carey* holds that it must adopt an interpretation that gives effect to both §§ 141(a) and 195. *Carey* does not, however, address the logical interpretation that these two statutes, when read together, direct that adjustment be used for non-apportionment census functions but not for apportionment purposes.

City of Philadelphia is decided incorrectly because it is based upon a selective reading of the legislative history of the Census Act. *City of Philadelphia* does not address the clear statements in the 1957 and 1976 House and Senate Reports that sampling procedures can be used by the Secretary except in the apportionment of the United States House of Representatives. See H. R. Rep. No. 1043, 85th Cong., 1st Sess., at 10 (1957); S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706; S. Rep. No. 94-1256, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5463, 5468.

Young is wrong for several reasons. First, the plain language of § 195 does not state that sampling can be a part of the count, but not all of the count, for apportionment purposes. Second, the conclusion that § 195 means what it says and actually prohibits adjustment for apportionment purposes does not render it unconstitutional. Article I, § 2, cl. 3 of the Constitution directs Congress to specify the decennial census method. Finally, *Young* errs because it is based upon the conclusion that there is a constitutional right to census accuracy.

contains both §§ 141(a) and 195, and both must be followed. Respondents also fail to address the fact that § 141(a) does not state that sampling or adjustment can be used for apportionment purposes. Section 141 merely provides that sampling can be used with the census and the census can be used to collect different types of information. When §§ 141 and 195 are read together, the logical conclusion is that adjustment is allowed for non-apportionment purposes. Respondents offer nothing to refute this conclusion. Respondents make absolutely no attempt to explain why the Secretary should be allowed to adjust when § 195 expressly states that there can be no adjustment for apportionment purposes. Respondents offer nothing to refute the plain language of § 195.[7] That plain language is the constitutionally prescribed "manner" which Congress by law directed under art. I, § 2, cl. 3.

Even if Congress could constitutionally direct the decennial census to be statistically estimated, at this time it has chosen otherwise. Thus, the Secretary would have violated the mandate of art. I, § 2, cl. 3 if he had decided to allow statistical sampling for apportionment purposes. Congress has, by law, directed otherwise.

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[7]As also noted in legal commentary, the conclusion that the prohibition in § 195 is not actually a prohibition "mutilate[s] the clear wording of the statute." Note, *Lies, Damn Lies and Statistics: Dispelling Some Myths Surrounding the United States Census*, 1 Detroit L. Rev. 71, 87 (1990); Note, *Death, Taxes and Census Litigation: Do the Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?*, 64 Geo. Wash. L. Rev. (forthcoming Jan. 1996) ("the text of section 195 and its legislative history are clear -- sampling is not allowed [for] purposes of apportioning the House of Representatives.").

The language of § 195 is clear. If statutory language is clear, then judicial inquiry into statutory meaning is finished. *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Negonsott v. Samuels*, 113 S. Ct. 1119, 1123 (1993). The law also presumes that when Congress speaks in a statute, it means what it says and it says what it means. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Respondents ignore these presumptions. They offer no explanation as to why these canons of interpretation should not be followed. They do not and cannot explain away § 195.

Nor do respondents address the legislative history of § 195. Respondents do not dispute that the 1957 House Report, prepared with the enactment of § 195, states that "section 195 does not authorize the use of sampling procedures in connection with the apportionment of Representatives."[8] They also make no reference to the 1957 Senate Report which contains similar language.[9] Respondents do not deny that when Congress amended § 195 in 1976, it did not change the language that prohibits

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[8]U.S. Cong. House Comm. on Post Office and Civil Service. Revision of Census Law. Report to Accompany H.R. 7911. H.R. Rep. No. 1043, 85th Cong. 1st Sess., at 10, Washington, U.S. Govt. Print. Off., 1957, *and cited in* Cong. Res. Serv. Rep. for the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services of the Committee on Governmental Affairs, *The Decennial Census: An Analysis and Review*, pp. 85-86, 96th Cong., 2d Sess. (Comm. Print 1980).

[9]S. Rep. No. 698, 85th Cong., 1st Sess. (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1706, 1708.

adjustment for apportionment purposes. The obvious conclusion must be that if Congress made the prohibition at enactment and kept the prohibition at amendment, then the prohibition remains effective. Respondents do not challenge this argument.

4. Respondents also offer no response to Oklahoma's contention that Congress properly limited the census method in § 195 because Congress has the power to enact legislation that is "necessary and proper" to carry out its delegated responsibilities. U.S. Const. art. I., § 8, cl. 18. Congress has the power to determine the means of achieving its constitutionally authorized objectives. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966); *Kinsella v. United States*, 361 U.S. 234, 247 (1960). Congress decided that, as to the census objective, adjustment should not be used for apportionment purposes. This decision commands great deference from the judiciary, especially in light of the Constitution's explicit directive to Congress to determine the census-taking method. *United States Dept. of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992). Instead of granting deference to Congress' decision, respondents seek to completely ignore it by rejecting any application of § 195.

5. One primary reason advanced for granting the certiorari petitions was the conflict between circuit court rulings on the question of census adjustment. The Second Circuit's holding in this case is directly opposite to the decisions of the Sixth and Seventh Circuit Courts of Appeals in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), and *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992). Both *City of Detroit* and *Tucker* rejected claims that the 1990 census should be statistically adjusted and both ruled that there is no

constitutional right to census accuracy. *City of Detroit*, 4 F.3d at 1375, 1378; *Tucker*, 958 F.2d at 1417, 1419. Respondents, however, make no attempt to refute these rulings. Respondents' treatment of these two cases is limited to one reference to *Tucker*. The lone reference to *Tucker* does not include the holding of the case but concerns only the issue of the requirement of intent in equal protection cases. [Respondents' Br. 70-71.] Respondents do not mention the *City of Detroit* opinion.

6. Respondents' brief demonstrates almost conclusively an observance made in both *City of Detroit* and *Tucker*. That is, adjudicating claims of this type would require the Court "to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." *City of Detroit*, 4 F.3d at 1378, quoting *Tucker*, 958 F.2d at 1418.

Respondents make no attempt to provide justiciable standards with which to decide this dispute and they do not address Oklahoma's contention that there are no available standards to apply. Neither the "one man, one vote" principle nor the constitutional language "in such Manner as [Congress] by Law shall direct" gives sufficient guidance to resolve a statisticians' debate. There is no justiciable standard by which to decide whether, in this case, the proposed formula with its 1,392 "smoothed," "modelled" and "regressed" adjustment factors is the formula required by the law.[10]

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[10]Respondents wholly misstate Oklahoma's position in this case by asserting that the "heart" of the petitioners' (and thus Oklahoma's) argument is based upon the claim that the "uncorrected census counts are, or at least probably are, as

Respondents admit that this dispute is framed by subjective, rather than legal, standards. Their analysis of the facts contains numerous references to the subjective nature of the issues involved: (1) the strata used in the Post-Enumeration Survey ("PES") provided "the greatest explanatory power in analyzing differences in undercount rates," (2) the Census Bureau director concluded that "prospects for a successful adjustment were good," (3) matching error in the PES "was not a serious source of bias," (4) the "impact of the aggregate error attributable to misreporting on the overall PES was insignificant," (5) "fabrications were found to be minimal," (6) error from follow-up interviews was of "minimal consequence," and (7) the Census Bureau concluded that "post-stratification had been effective." [Respondents' Br. 18, 22, 30, 31.] There are no legal standards to determine whether these conclusions satisfy the law. Nothing in the law directs a court to conclude whether something is a "serious," "insignificant" or "minimal" problem in a census adjustment formula. Respondents offer no legal standards to resolve this case.

7. While respondents pay lip service to the need to protect against politicization of the census process and imply politicization has occurred by the Secretary overriding technical expertise within the Census Bureau [Respondents'

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accurate as or more accurate than the corrected counts." [Respondents' Br. 2.] Oklahoma's position does not focus upon whether one method of number-finessing is better than another method. Instead, Oklahoma contends "responsibility for conducting the decennial census rests with Congress." *Baldridge v. Shapiro*, 455 U.S. 345, 347-48 (1982). Because broad discretion has been vested in Congress to direct the census process, the judiciary has only limited review.

Br. 58-59], respondents appear oblivious to the real dangers of political manipulation inherent in the course of action they advocate. If the Executive Branch has the power to make post-enumeration adjustments to the actual headcount, then any methodology for adjustments will be subject to partisan argument and "open the census process to charges of political manipulation." *Tucker*, 958 F.2d at 1413. Respondents pose no justification for disregarding concerns that opening the census up to adjustment by a variety of formulas will politicize the process and disrupt the transfer of political power in state governments. Respondents do not deny that public confidence in government and political stability are jeopardized in a world where the census figures are not or cannot be fixed because different interests advocate and litigate different adjustment formulas. The ability of federal courts to resolve complex statistical disputes about the best way to conduct a census is limited, at best. It is virtually guaranteed that not all courts would take the same side in a dispute of considerable technical complexity among census officials, statisticians and demographers. Protracted litigation disrupts and threatens the governmental timetable for a representative system of government. Here, return of the case to the district court would undoubtedly mean the census would be unresolved through the 1996 Presidential and congressional elections.

8. The majority of respondents' brief is devoted to the proposition that statistical adjustment results in a more accurate census and that the Secretary's refusal to adjust denies citizens equal voting power. [Respondents' Br. 48, 50.] As discussed above, this position is flawed because it does not address whether the Secretary has the *power* to adjust the census for apportionment purposes. If, however, one assumes for the sake of argument that the Secretary does have the ability to adjust, then respondents'

position still fails. Respondents' argument breaks down because it is premised upon a right to voter equality but it makes no connection between voters and the census. Respondents do not address the fact that the census does not count voters. It counts people, voters and nonvoters alike. This fact was addressed by the Seventh Circuit Court of Appeals in *Tucker*. After referencing this Court's adoption of the "one man, one vote" principle, the Seventh Circuit stated:

> Correcting the undercount might actually offend against that principle, by creating disparities in voting power based not on differences in the number of voters but on differences in the number of nonvoters.

Tucker, 958 F.2d at 1419.

The Seventh Circuit did not ultimately resolve this issue because it based its decision on other grounds:

> On the other hand, it can be argued that people, not just voters, are entitled to equal representation, [citations omitted] consistent with the Constitution's reference to apportioning congressional representation by "Numbers" (of people). [citations omitted] But all this is an aside. The dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical

> methodology is a case whose gears fail to mesh with any judicially enforceable federal rights.

Tucker, 958 F.2d at 1419. Although the Seventh Circuit did not answer this question, the court in *Tucker* did recognize that this question is relevant in the context of census adjustment disputes.

In this case, there is nothing in the record that establishes whether the undercounted people are voters or nonvoters. If for example, a corrected count added a large number of people to State "A" and increased "A's" number of representatives but the added people were nonvoters, then arguably, the voters of State "B," that lost a representative, suffered a loss of voting strength. The voting power of the voters in State "B" would be diluted because fewer numbers of voters would be electing more representatives in State "A" than in State "B." Such a result contradicts the "one man, one vote" principle.

If respondents base their argument on the right to voter equality, then they should be required to connect voters to the census or explain why such a connection is not necessary. They make no attempt to do either.

For the reasons stated above and in Oklahoma's Brief on the Merits, the Second Circuit Court of Appeals' decision should be reversed and the Secretary's decision not to adjust the 1990 census should be upheld.

Respectfully submitted,

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